

PROTECTION OF FOREIGN INVESTMENT IN CENTRAL ASIA

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Central Asia, with its abundance of natural resources and low labor costs, is often seen as an attractive destination for foreign investment. The inflow of foreign investment into Central Asia has significantly increased in recent decades, and this phenomenon supports the improvement of both national economies and the welfare of the region. Still, Central Asia is not classified as a low-risk destination for foreign investment because of inadequate protection of foreign investment – particularly a lack of transparency and predictability in Central Asia states' FDI (Foreign Direct Investment) regimes. Furthermore, international organizations (such as the OECD) indicate that some countries in Central Asia do not have clear investment policies. These points pose problems for foreign investors who desire to invest in the region. From this perspective, this article analyzes the consistency of the general principles of foreign investment in Central Asia with international investment standards.

Keywords: Central Asian states; FDI regimes; protection of foreign investment.

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Introduction

It is widely recognized that foreign direct investment is the cornerstone of growth and sustainable development. In the light of such phenomenon, Central Asian states (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) attempt to attract foreign investment into their countries through structural reforms. Foreign direct investment (FDI) inflow into the Central Asia region has significantly increased since the collapse of the Union of Soviet Socialist Republics (USSR). In this process, the Central Asian states attempted to create legal frameworks for foreign investment, in order to attract more of it. In comparison with developed and developing countries, foreign direct investment in the Central Asian states remains at a low level. Additionally, foreign direct investment is often concentrated in a just few sectors (and in natural resource extraction in particular).¹ Generally, Central Asian states are not classified as low risk for foreign investments. One of the explanations for this classification is that all Central Asian states have serious problems with the rule of law, control of corruption, and transparency. These factors play crucial roles in determining the host country's attractiveness for foreign investors. Kazakhstan fares better in all criteria compare to Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.² Still, poor-quality regulations, as well as inconsistent interpretation and arbitrary application of laws, continues to be a major problem for the Kazakhstan foreign investment regime.³

Outside factors (such as regional conflicts and economic sanction against Russia) have an adverse effect on inflow of FDI in the region. In 2017, Kazakhstan attracted

¹ OECD, Promoting Investments and Job Creation in Central Asia through Business Linkage Programs, OECD Handbook (May 2013), at 14 (Nov. 4, 2019), available at <https://www.oecd.org/global-relations/BusinessLinkageProgrammes.pdf>.

² The World Bank, Worldwide Governance Indicators (Nov. 4, 2019), available at <https://info.worldbank.org/governance/wgi/Home/Reports>.

³ OECD, OECD Investment Policy Reviews: Kazakhstan 2017, at 26 (Nov. 4, 2019), available at <http://www.oecd.org/countries/kazakhstan/oecd-investment-policy-reviews-kazakhstan-2017-9789264269606-en.htm>.



the most foreign direct investment among the Central Asian states, with \$4.6 billion while in 2016 it was \$12.223 billion. Turkmenistan received the second most FDI, with \$2.31 billion in 2017. Tajikistan garnered very low levels of foreign investment at \$141 million, followed by Uzbekistan with \$96 million and Kyrgyzstan with \$94 million.⁴ Overall numbers indicate that FDI flows to Central Asia have declined considerably. This decrease of FDI into the region's developing countries, and the rise of pressure over foreign investment, is a major concern in the recent development of the host countries' investment policies.⁵ In this phenomenon, Central Asian states are presented with a good opportunity to review their investment policies and regulation regimes in order to attract more FDI. From this perspective, those countries are focusing more on investment policy. However, while there has been some effort expended towards improving the legal framework for foreign investment in the region, it is difficult to say that such development can satisfy foreign investor's expectations.

1. Comparative Analyses of the General Principles of Foreign Investment Laws in Central Asian States

Foreign investment laws are often described as a core policy tool for promoting and regulating investment. These laws are not only instruments for dealing with investment, but are also part of the general framework of the host country's investment policies. Although investment laws include common objectives, they are distinguished from their content and overall approach.⁶ A common aspect of foreign investment laws among developing countries is that they cover all aspects of foreign investment. These investment laws or codes contain provisions for the admission of foreign investment, protections for foreign investors, tax treatment of investments, non-discrimination rules, legal restrictions, and guidelines for settling disputes. In the case of Central Asian countries, a number of potential obstacles still exist that hamstring host country efforts to carry out investment objectives. Such obstacles range from a lack of awareness of the home countries to the transparency and consistent application of laws and regulations. The overall regulatory regimes for FDI remain general and opaque in Central Asian states. In this regard, the implementation of laws related to foreign investment depends to a great degree on bureaucratic discretion. Furthermore, comparative study shows that foreign investors are more concerned about the overall statutory FDI regulation of the host

⁴ The World Bank, Foreign Direct Investment, Data (Nov. 4, 2019), available at <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

⁵ UNCTAD, World Investment Report 2018: Investment and New Industrial Policies, United Nations (2018) (Nov. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

⁶ UNCTAD, Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor (November 2016) (Nov. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/webdiaepcb2016d5_en.pdf.



country than particular preferences.⁷ From this point of view, it seems to be difficult to provide massive FDI inflow into Central Asian states without a transparent and predictable investment environment for foreign investment.

1.1. Admission of Foreign Investment

Traditionally, states have seen themselves as having full control over the admission and establishment of foreign investment in their states. However, there are some reasons (such as a lack of domestic resources and the transfer of new technology and know-how) to force states to liberalize their foreign investment regimes – including entry and establishment for foreign investment.⁸ National treatment provision for the admission of foreign investment is an important feature of a host country's investment regime. The latest developments in international investment law shows that host countries are more willing than ever to attract foreign investment and create favorable investment climates. In this regard, transparent and investor-friendly regulation promotes inflow of foreign investment into the host country.

Host country control over foreign investment at the stage of entry can be based on a few criteria. In this regard, host countries may feel responsible for taking measures to preserve national economic policy goals, national security, public health and safety, and for serving other important issues of public policy. Such control over foreign investment can be considered an expression of sovereignty and economic self-determination. Host countries can apply different procedures for the admission of foreign investment. Comparative study of foreign investment laws shows that notification and approval procedures are common for admission of foreign investment into countries.⁹ Notification systems mean that foreign investors have an obligation, upon entering/establishing their investment, to notify a given host country administrative body. Conversely, an approval or screening system does not allow an investor to enter a state prior to obtaining administrative approval.

⁷ OECD, China: Progress and Reform Challenges (2003), at 1 (Nov. 4, 2019), available at <http://www.oecd.org/daf/inv/investmentfordevelopment/33830343.pdf>.

⁸ UNCTAD, Admission and Establishment, UNCTAD Series on Issues in International Investment Agreements, United Nations (2002), at 11 (Nov. 4, 2019), available at https://unctad.org/en/Docs/iteiit10v2_en.pdf.

⁹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 105 (3rd ed., Cambridge: Cambridge University Press, 2010); Peter Muchlinski et al., *The Oxford Handbook of International Investment Law* 229 (Oxford; New York: Oxford University Press, 2008); Giorgio Sacerdoti, *The Admission and Treatment of Foreign Investment Under Recent Bilateral and Regional Treaties*, 1(1) *Journal of World Investment & Trade* 105, 108 (2000); Amokura Kawharu, *The Admission of Foreign Investment Under the TPP and RCEP*, 16(5-6) *Journal of World Investment & Trade* 1058, 1061 (2015); Jean-Yves P. Steyt, *Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies*, LL.M. Graduate Research Papers, Paper 1 (May 2006), at 76 (Nov. 4, 2019), available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1031&context=lps_LLMGRP.

From a Central Asian states perspective, Kazakhstan,¹⁰ Kyrgyzstan,¹¹ Tajikistan,¹² and Uzbekistan¹³ do not apply strict procedures to the admission of foreign investment, while Turkmenistan¹⁴ does. However, it is common practice in Central Asian states to remain absolute or quasi-monopolies in certain economic sectors. In the case of Uzbekistan, for example, the list of state assets that cannot be privatized includes oil transportation, oil production, gas and gas pipelines, the production and transportation of electricity, rail, public mail service, water and sewer servicing, air navigation services, ports and airports.¹⁵ Similar laws and regulations exist in the legal frameworks of Kazakhstan,¹⁶ Kyrgyzstan,¹⁷ Tajikistan,¹⁸ and Turkmenistan.¹⁹ Although

¹⁰ Закон Республики Казахстан от 8 января 2003 г. № 373-II «Об инвестициях» // Ведомости Парламента Республики Казахстан. 2003. № 14. Ст. 274 [Law of the Republic of Kazakhstan No. 373-II of 8 January 2003. On Investments, Journal of Parliament of the Republic of Kazakhstan, 2003, No. 14, Art. 274].

¹¹ Закон Кыргызской Республики от 27 марта 2003 г. № 66 «Об инвестициях в Кыргызской Республике» // Ведомости Жогорку Кенеша Кыргызской Республики. 2003. № 7. Ст. 252 [Law of the Republic of Kyrgyzstan No. 66 of 27 March 2003. On Investments in the Kyrgyz Republic, Journal of Jogorku Kenesha of the Republic of Kyrgyzstan, 2003, No. 7, Art. 252].

¹² Закон Республики Таджикистан от 12 мая 2007 г. № 260 «Об инвестициях» // Ахбори Маджлиси Оли Республики Таджикистан. 2007. № 5. Ст. 65 [Law of the Republic of Tajikistan No. 260 of 12 May 2007. On Investments, Mazhlisi Oli of the Republic of Tajikistan Collection of Legislation, 2007, No. 5, Art. 65].

¹³ Закон Республики Узбекистан от 30 апреля 1998 г. № 609-I «Об иностранных инвестициях» // Ведомости Олий Мажлиса Республики Узбекистан. 1998. № 5-6. Ст. 91 [Law of the Republic of Uzbekistan No. 609-I of 30 April 1998. On Foreign Investments, Journal of Oliy Majlis of the Republic of Uzbekistan, 1998, Nos. 5-6, Art. 91].

¹⁴ Закон Туркменистана от 20 марта 2008 г. № 184-111 «Об иностранных инвестициях» // Ведомости Меджлиса Туркменистана. 2008. № 1. Ст. 17 [Law of Turkmenistan No. 184-111 of 20 March 2008. On Foreign Investments, Journal of Majlis of Republic of Turkmenistan, 2008, No. 1, Art. 17].

¹⁵ Закон Республики Узбекистан от 19 августа 1999 г. № 815-I «О естественных монополиях» // Ведомости Олий Мажлиса Республики Узбекистан. 1999. № 9. Ст. 212 [Law of the Republic of Uzbekistan No. 815-I of 19 August 1999. On Natural Monopolies, Journal of Oliy Majlis of the Republic of Uzbekistan, 1999, No. 9, Art. 212].

¹⁶ Закон Республики Казахстан от 9 июля 1998 г. № 272-I «О естественных монополиях и регулируемых рынках» // Ведомости Парламента Республики Казахстан. 1998. № 16. Ст. 214 [Law of the Republic of Kazakhstan No. 272-I of 9 July 1998. On Natural Monopolies and Regulated Markets, Journal of Parliament of the Republic of Kazakhstan, 1998, No. 16, Art. 214].

¹⁷ Закон Кыргызской Республики от 8 августа 2011 г. № 149 «О естественных монополиях в Кыргызской Республике» // Ведомости Жогорку Кенеша Кыргызской Республики. 2011. № 7. Ст. 1052 [Law of the Republic of Kyrgyzstan No. 149 of 8 August 2011. On Natural Monopolies in the Republic of Kyrgyzstan, Journal of Jogorku Kenesha of the Republic of Kyrgyzstan, 2011, No. 7, Art. 1052].

¹⁸ Закон Республики Таджикистан от 5 марта 2007 г. № 235 «О естественных монополиях» // Ахбори Маджлиси Оли Республики Таджикистан. 2007. № 3. Ст. 168 [Law of the Republic of Tajikistan No. 235 of 5 March 2007. On Natural Monopolies, Mazhlisi Oli of the Republic of Tajikistan Collection of Legislation, 2007, No. 3, Art. 168].

¹⁹ Turkmenistan does not have a specific law to regulate competition. Fair competition is regulated by Article 17 of the Law on State Support to Small and Medium Enterprises. See Закон Туркменистана от 15 августа 2009 г. № 57-IV «О государственной поддержке малого и среднего предпринимательства» // Ведомости Меджлиса Туркменистана. 2009. № 3. Ст. 59 [Law of Turkmenistan No. 57-IV of 15 August 2009. On State Support to Small and Medium Enterprises, Journal of Majlis of Republic of Turkmenistan, 2009, No. 3, Art. 59].



there is no entry barrier for foreign investment in Tajikistan's legal framework, some economic sectors are de facto closed to FDI. Restrictions on formal ownership by foreign investors are not present, apart from the existence of some requirements in the financial sector. However, a lack of transparency in the registration of entities (a single window system) may be seen as an informal restriction on foreign investors. Tajikistan has no comprehensive plan to abolish the majority of the state monopoly in the foreseeable future.²⁰

In Turkmenistan, state expertise – including sanitary and environmental requirements – is mandatory for all foreign investors.²¹ In other words, Turkmenistan's investment regime does not allow foreign investors to enter the country without screening or approval by the appropriate administrative bodies – even though there are no guidelines firmly defining the scope of the state's expertise (screening system). In 2013, the Foreign Investment Review Agency was established to protect the national economy from foreign investment. The agency has a broad mandate to perform comprehensive review of foreign investment, including potential political and financial risk. According to the World Bank Guidelines on the Treatment of Foreign Direct Investment,²² a restricted list of investments is a more effective approach for host countries. Conditional admission discourages inflow of foreign investment into host country, and/or promotes evasion and corruption. It is common practice for a host country to restrict the activity of foreign investment within select economic sectors; this practice is called a restricted list approach. According to this approach, some of sectors are subject to a screening procedure or are prohibited for foreign investors.²³

Some degree of restriction on foreign investment²⁴ is the common practice in many state foreign investment regimes, with particular focus on both national security and cultural factors.²⁵ The latest trends in international foreign investment law indicate that

²⁰ UNCTAD, Investment Policy Review: Tajikistan, United Nations (2016), at 6 (Nov. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/diaepcb2016d1_en.pdf.

²¹ Art. 7 of the Turkmenistan's Investment Law.

²² The World Bank, Legal Framework for the Treatment of Foreign Investment, Vol. II: Guidelines (1992) (Nov. 4, 2019), available at <http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf>.

²³ OECD, Policy Framework for Investment (2015 Edition), at 25 (Nov. 4, 2019), available at <https://www.oecd.org/daf/inv/investment-policy/Policy-Framework-for-Investment-2015-CMIN2015-5.pdf>.

²⁴ UNCTAD, Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies, United Nations (2006) (Nov. 4, 2019), available at https://unctad.org/en/Docs/iteia20061_en.pdf; Stephen S. Golub, *Measuring of Restrictions on Inward Foreign Direct Investment for OECD Countries*, 2003(1) OECD Economic Studies 85 (2003); OECD, FDI Restrictiveness, Data (Nov. 4, 2019), available at <https://data.oecd.org/fdi/fdi-restrictiveness.htm>.

²⁵ OECD, Freedom of Investment, National Security and "Strategic" Industries: Progress Report by the OECD Investment Committee (Nov. 4, 2019), available at <https://www.oecd.org/investment/investment-policy/40473798.pdf>; OECD, Guidelines for Recipient Country Investment Policies Relating to National Security, Recommendation adopted by the OECD Council on 25 May 2009 (Nov. 4, 2019), available at <https://www.oecd.org/daf/inv/investment-policy/43384486.pdf>.



host countries have started to be more restrictive of foreign investments, especially with regard to state-owned enterprises (SOEs). There is a fear that in some cases, foreign investors could be controlled directly or indirectly by foreign governments and thus used as political tools against the host country. To prevent these cases, most host states take measures to bar certain types of foreign investment. The inevitable consequence of such review of foreign investment is a lack of transparency and consistency.²⁶ Concerns over foreign investment, especially state-owned enterprises often create pressure in host states to adopt laws to restrict foreign investments. States (notably Australia, the United States, Japan, Canada, China, and Russia)²⁷ have already implemented review systems in which foreign investment in parts of critical infrastructure is subject to review. For example, the U.S.'s Committee on Foreign Investment in the United States (under the purview of the U.S. Treasury Department) has broad authority over foreign investment in the country and can restrict such investment due to national security²⁸ or other concerns. Likewise, in 2017, Russia adopted new rules relating to restriction of foreign investments. According to these amendments the Governmental Commission may demand prior approval of transactions relating to any Russian company (not only companies that are considered as a strategic).²⁹

It can be seen clearly that there are still gaps to fill in the admission of foreign investment in the Central Asian states' FDI regimes. Predictability and transparency are an indispensable part of national systems concerning foreign investment legislation and policy. Clear entry requirements, such as positive and negative lists, make the legal framework for foreign investments transparent and predictable. In this respect, foreign investors can make investment planning decisions within the scope of that legal framework, and adjust themselves to the legal framework of the host country. Furthermore, the existence of many provisions to protect foreign investors is not adequate to satisfy foreign investor expectations. Without effective

²⁶ Justin O'Brien, *Barriers to Entry: Foreign Direct Investment and the Regulation of Sovereign Wealth Funds*, 42(4) International Lawyer 1231, 1242 (2008).

²⁷ See, for more detail, comparative study of restriction of foreign investment regulations: Laura Fraedrich et al., *Foreign Investment Control Heats Up: A Global Survey of Existing Regimes and Potential Significant Changes on the Horizon*, 13(4) Global Trade and Customs Journal 141, 143 (2018); Pim Jansen, *Industrial Policy in the Context of Merger and Foreign Investment Control*, 24(2) Columbia Journal of European Law 157, 157 (2018); Fabio Bassan, *Host States and Sovereign Wealth Funds, Between National Security and International Law*, 21(2) European Business Law Review 165, 166 (2010); Jackie VanDerMeulen & Michael J. Trebilcock, *Canada's Policy Response to Foreign Sovereign Investment: Operationalizing National Security Exceptions*, 47(3) Canadian Business Law Review 392, 400 (2009).

²⁸ The Foreign Investment and National Security Act of 2007, Pub. L. 110–49, 121 Stat. 246 (2007).

²⁹ Федеральный закон от 29 апреля 2008 г. № 57-ФЗ «О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства» // Собрание законодательства РФ. 2011. № 1. Ст. 32 [Federal Law No. 57-FZ of 29 April 2011. On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for the National Defense and National Security of the Russian Federation, Legislation Bulletin of the Russian Federation, 2011, No. 1, Art. 32].



mechanisms of implementation, such provisions will fail to promote FDI inflow into the host country.

1.2. National Treatment Clause

National treatment clauses provide rights for foreign investors to be treated like domestic investors. However, the scope of such provisions can be limited in certain economic sectors. International practice shows that national treatment clauses,³⁰ in the great number of foreign investment laws, contains some notable exceptions. These exceptions carry some uncertainty and stipulate that the scope of national treatment clauses refer to “special laws or international treaty,” or exclude (through negative lists) certain economic sectors or specific matters (such as access to real assets).³¹

All Central Asian states’ foreign investment laws guarantee non-discrimination between foreign investment and domestic investors. However, the scope of these national treatment clauses is subject to limitation through exceptions which stipulate that certain economic sectors are not open to foreign investment under natural monopoly. It is interesting to point out that the legal framework for domestic and foreign investment is no different in Kazakhstan, Kyrgyzstan, and Tajikistan. In the case of Kazakhstan, the New Law on Investment repealed the usage of the terms “foreign investment” and “foreign investor” and established a common term (“investor”) for all affected parties.³² Such countries’ laws relating to investment include domestic as well as foreign investors, and the legal framework for foreign investment is regulated through “investment law.” Doing this theoretically provides for the equal treatment of domestic and foreign investors.

On the other hand, the FDI regimes of Turkmenistan and Uzbekistan are subject to different laws. As a matter of fact, these foreign investment laws provide more rights (or fewer rights) to foreign investors than domestic investors. For example, foreign investors may have received preference and incentives that are not accessible to domestic investors. It is important to note that the host country should keep in balance the promotion and protection of investment between domestic and foreign investors. Comparative investment law shows the host countries are more willing to abolish such

³⁰ See, for more detail, Sornarajah 2010, at 201; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 198 (2nd ed., Oxford; New York: Oxford University Press, 2012); Zachary Douglas, *The International Law of Investment Claims* 127 (New York: Cambridge University Press, 2009).

³¹ UNCTAD, *World Investment Report 2017: Investment and the Digital Economy*, United Nations (2017), at 109 (Nov. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

³² Leonid Shmatenko, *An Overview of Kazakhstan’s Investment Laws and its Investor-State Arbitral Awards*, 30(4) *International Law Quarterly* 26, 26 (2013). See also, in accordance with Article 4/3 of the Kyrgyzstan’s Investment Law, “The Kyrgyz Republic through its authorized government bodies shall grant equal investment rights to domestic and foreign investors...” According to Article 7 of the Tajikistan’s Investment Law, “The Government of the Republic of Tajikistan guarantees the rights equality of the foreign and domestic investors that preclude the rights discrimination of investors related to their citizenship, nationality, language, gender, race and religion.”



practice. Take the example of China's FDI regime. China is planning to abolish the two-track legislative model. Different provision relating to taxation, foreign currency, and imports and exports pose problems for domestic investors, and legal disadvantages may lead to a lack of enthusiasm to invest among domestic investors. Furthermore, equal competition is an indispensable part of a market economy, but two-track legislation models put domestic investors in unequal positions. This has a negative impact not only on the competitiveness of domestic enterprises, but can also result in the loss of foreign investor confidence due to violation of national treatment.³³

1.3. Expropriation

States have the power to expropriate foreign investments lawfully on the condition that the expropriations meet certain requirements.³⁴ Such requirements³⁵ often include that expropriation has taken place for a public purpose, is non-discriminatory, is carried out under law, and that prompt, adequate and effective compensation is provided. Comparative study shows that a majority of foreign investment laws define the elements of lawful expropriation.³⁶

Central Asian states' FILs provide assurance to foreign investors against expropriation. However, the scope of expropriation clauses are different among the states. For example, the foreign investment law of Tajikistan includes an explicit definition related to the indirect expropriation within the scope of investment expropriation.³⁷ However, this clause does not define any difference between indirect compensation and non-compensable regulation (in the interest of the state and/or society), and such expropriation is excluded from the scope of compensable expropriation. Similarly, Kyrgyzstan's FIL defines indirect expropriation as "depriving foreign investor of the benefits of investment" (Art. 6). In contrast, the FILs of Kazakhstan, Uzbekistan and Turkmenistan provide for the protection of foreign

³³ Shu-Xue Jia, *On the Improvement of China's Legal System of Foreign Direct Investment*, 8(4) Journal of Politics and Law 293, 300 (2015).

³⁴ See, for more detail, Sornarajah 2010, at 412; Dolzer & Schreuer 2012, at 98; Douglas 2009, at 425; Tarcisio Gazzini, *Drawing the Line Between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment – An Economic Analysis of Law Perspective*, 7(3) Manchester Journal of International Economic Law 36, 51 (2010); OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, OECD Working Paper on International Investment 2004/4 (September 2004) (Nov. 4, 2019), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.

³⁵ Art. 13(1) of the Energy Charter Treaty. All Central Asian States is part of the Energy Charter Treaty (Nov. 4, 2019), available at <https://energycharter.org/who-we-are/members-observers>.

³⁶ Investment Policy Review: Tajikistan, *supra* note 20, at 7.

³⁷ According to this clause, "The expropriation of investments, including indirect (indirect) expropriation on the territory of the Republic of Tajikistan or the adoption of measures equivalent to the expropriation of investments is prohibited, except for expropriation in the interests of the state or society, on a non-discriminatory basis, in accordance with the procedure established by the legislation of the Republic of Tajikistan, timely, adequate and efficient payment of compensation" (Art. 14).



investment against expropriation—this protection carries some uncertainty. For example, Kazakhstan's FIL refers to exceptional cases (provided by Kazakhstan legislation) of non-compensation expropriation (Art. 8). This clause includes some ambiguity in that the scope is extremely broad. In particular, it raises questions about protection against expropriation in the scope of the host country which is not consistent with international law. The provision for calculation of compensation in the FILs of Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan each provide for full compensation in cases of compensable expropriation, whereas Turkmenistan's FIL contains no definition for the calculation of compensation.

The host country may refuse to admit the expropriation nature of measurements in cases of direct expropriations, and will not offer compensation for foreign investors. In such circumstances, foreign investors will bring cases against the host country and it will be tribunal responsibility to define whether expropriation has taken place.³⁸ However, investment arbitration practice indicates that disputes relating to expropriation, either lawful or unlawful, are uncommon.

Cases where no compensation has been paid because the label of expropriation itself is contested are the norm. That means that almost every decision finding expropriation would also find unlawful expropriation – and almost every tribunal would then set aside the “fair value market value at the time expropriation” standard for compensation for expropriation.³⁹

1.4. Investment Incentives

Developing countries, including Central Asian states, use incentives as a tool to promote FDI. One reason that policy instruments will likely remain popular among host countries is that a few examples (such as Ireland, Switzerland, and Singapore) have shown the ability to attract significant levels of foreign investment through fiscal and other investment incentives.⁴⁰ Traditionally, there are three main categories of investment incentives for attracting FDI: financial, fiscal, and regulatory. Regulatory incentives often include the lowering of environmental, health, safety, and labor standards; temporary or permanent exception from national standards; and stabilization clauses that dictate that the host country will not change its regulatory framework of the investment.⁴¹ Regulatory incentives may also be realized

³⁸ UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations (2012), at 105 (Nov. 4, 2019), available at https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

³⁹ *Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, para. 138.

⁴⁰ Sarianna M. Lundan, *Definitions, Motivations, and Locational Determinants of Foreign Direct Investment: Trends and Policy Options in Rethinking Investment Incentives: Trends and Policy Options* 45, 56 (A.T. Tavares-Lehmann et al. (eds.), New York: Columbia University Press, 2016).

⁴¹ UNCTAD, Incentives, UNCTAD Series on Issues in International Investment Agreements, United Nations (2004) (Nov. 4, 2019), available at https://unctad.org/en/Docs/iteit20035_en.pdf.



through laws. Laws related to the establishment of a free trade zone may contain special provisions regarding labor, taxation and other issues. Investment laws are also considered regulatory incentives. These laws often include substantial and procedural rights, and are more common in developing countries than in developed countries. It is important to note that these countries apply investment incentives as one part of a coordinated policy.⁴²

The main difficulty with incentives is their effective application to foreign investors. In Central Asian states, investment incentives often lack clear provisions and consistency. The case of Tajikistan indicates that Article 21 of the Law on Investment provides some guidelines relating to the incentives for foreign investors such as customs, tax, and state guarantees. However, this provision imposes no eligibility criteria to define investment incentives. For instance, in the case of state grants, foreign investors can only access them by signing a contract with the government, whether it involves no eligibility requirements or procedures relating to state grants.⁴³ Similarly, in Kazakhstan despite laws outlining the general principles of investment incentives, the choice and the scope of incentives are still determined on a case-by-case basis. It is necessary to apply an effective investment incentives policy in order to provide clarity, visibility, and predictability for investors. First of all, transparency and non-discrimination criteria may be good solutions for creating a predictable and conducive environment for investors. Second, an efficient incentive system should not exist without a correlating evaluation system.⁴⁴ This is also the case in Kyrgyzstan, Turkmenistan, and Uzbekistan. Terms and conditions relating to the state, such as investor contracts including allocated incentives, are usually not publicly accessible. This could raise questions over the transparency of such incentives. Nevertheless it is widely believed that investment incentives contribute to attracting FDI, and host country taxation and investment incentives play only a limited role in determining the inflow of FDI. Among the key factors for determining FDI are transparency, simplicity, stability, and certainty in the application of tax law and tax administration.⁴⁵

⁴² Ana Teresa Tavares-Lehmann, *Types of Investment Incentives in Rethinking Investment Incentives: Trends and Policy Options*, *supra* note 40, at 17, 32.

⁴³ In accordance with Article 22/1 of the Tajikistan's Investment Law, "The Government of the Republic of Tajikistan may provide investors with the government in-kind grants through the government authorized organs in the sphere of investments in frame of investment and other treaties"; According to Article 4/7 of the Kyrgyzstan's Investment Law, "Investors investing into top priority economic and social sectors and in certain areas of the Republic pursuant to the national programs (projects) may be granted investment incentives in accordance with Kyrgyz laws." *See also* detailed review of this provision: Investment Policy Review: Tajikistan, *supra* note 20, at 8.

⁴⁴ OECD Investment Policy Reviews: Kazakhstan, *supra* note 3, at 117.

⁴⁵ OECD, Tax Incentives for Investment – A Global Perspective: Experiences in MENA and Non-MENA Countries: Draft (June 2007), at 4 (Nov. 4, 2019), available at <http://www.oecd.org/mena/competitiveness/38758855.pdf>.



The stabilization clause in the scope of regulatory incentives is a regular provision of national investment framework in Central Asian states.⁴⁶

All Central Asian states – but notably Kazakhstan, Tajikistan, Turkmenistan, Uzbekistan, and Kyrgyzstan – have investment laws that contain stabilization clauses. These stabilization clauses are often seen as indispensable and persuasive tools for attracting foreign investment in risky environments.⁴⁷ Taking measures to protect

⁴⁶ In accordance with Article 4/3 of the Kazakhstan's Investment Law, "The Republic of Kazakhstan guarantees the stability of agreements concluded between the investor and the public authorities of the Republic of Kazakhstan, except in cases where a change in contacts made by mutual agreement. This warranty does not apply to:

1. Changes in the legislation of the Republic of Kazakhstan and/or the entry into force and/or changes in international treaties of the Republic of Kazakhstan, which altered the terms and condition of import, production, sales of excisable goods;
2. Changes and additions are made to legislative acts of the Republic of Kazakhstan in order to ensure national and environmental security, healthy and morality."

According to Article 8/5 of the Tajikistan's Investment Law, "The investment terms deterioration prescribes the modification and amendments to the legislation of the Republic of Tajikistan and the new normative legal acts of the Republic of Tajikistan adoption that include:

- The increase in the tax burden compared to the tax burden on the day of the beginning of financing of the investment project;
- The introduction of quantitative restrictions on the volumes of investing and other additional requirements by investment value or other prohibitions and restrictions;
- The imposition of restrictions on equity participation of the foreign investor in authorized funds (Charter capital) of legal entities.

This mode does not apply in respect of changes and amendments to the Constitution of the Republic of Tajikistan and in the legislation of the Republic of Tajikistan related to matters of national security, public health, environmental protection, morality and ethics."

In accordance with Article 8/5 of the Turkmenistan's Investment Law, "If the change in the legislation of Turkmenistan leads to the prohibitions and restrictions, worsening the legal regime for foreign investors, enterprises with foreign investment, the legislation of Turkmenistan, as in force at the time of registration of foreign investments, is used against them for ten years, and the enterprises of foreign legal entities, branches foreign legal entities implementing investment projects on the basis of the decision of the Cabinet of Ministers of Turkmenistan—in the project payback period, stated in in the order established by normative legal acts of Turkmenistan, with its registration. The provisions of this part also apply to the tax legislation of Turkmenistan. The provision of this subsection shall not apply to the changes in the legislation of Turkmenistan in order to protect the constitutional order, of defense and state security."

In accordance with Article 3 of the Uzbekistan's Law on Guarantees and Measures of Protection of Foreign Investment, "Legislative acts including departmental normative ones have not retroactive effect if their execution causes damage to foreign investor or foreign investments. If the subsequent legislation of the Republic of Uzbekistan makes worse investment conditions, than legislation current on the date of investment is applied to foreign investments within ten years of the date of investment. The foreign investor has the right at his own discretion to apply those provisions of a new legislation which make better conditions of his investment." See Закон Республики Узбекистан от 30 апреля 1998 г. № 611-I «О гарантиях и мерах защиты прав иностранных инвесторов» // Ведомости Олий Мажлиса Республики Узбекистан. 1998. № 5-6. Ст. 93 [Law of the Republic of Uzbekistan No. 611-I of 30 April 1998. On Guarantees and Measures of Protection of Foreign Investment, Journal of Oliy Majlis of the Republic of Uzbekistan, 1998, No. 5-6, Art. 93].

⁴⁷ Alisher Umirdinov, *The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development*, 43(4) Denver Journal of International Law and Policy 455, 456 (2015). See also, Frank Sotonye, *Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities*, 16(1) Journal of World Investment & Trade 88, 121 (2015), Lorenzo Cotula, *Stabilization*



against frequent legislative changes by the host country may give assurance to foreign investors, especially for long-term projects. From this point of view, a lack of stability in Kyrgyzstan's legislation may raise questions over inadequate protection for foreign investors. In the case of Kyrgyzstan, recent developments support some concerns over potential political instability.⁴⁸ For example, a tribunal in *Stans Energy v. Kyrgyzstan* said, in this respect: the foreign investor expects that the actions of the state towards it will be consistent, unambiguous, and completely transparent, so that it can know in advance all rules and procedures which could regulate the investments it makes, as well as the purposes of the adoption of any policy, administrative practice, or regulatory acts in order for the investor to be able to ensure its investments complies with such rules. The tribunal concluded that the Kyrgyz Republic acted contrary to the legal expectations of the investor. When acquiring the company with the license the investor could not "legitimately expect" that after three years it would actually be deprived of the license.⁴⁹

Although Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan provide a stabilization clause in the context of their FIL, it differs with regard to scope. In the context of Kazakhstan's Foreign Investment Law, the stabilization clause is limited to state-investor contracts whereas Turkmenistan, Tajikistan, and Uzbekistan each include stabilization clauses related to all investments. In light of this, the scope of the stabilization clause in the context of Tajikistan's, Turkmenistan's, and Uzbekistan's FIL provides broader coverage than Kazakhstan's. Furthermore, the stabilization clause is restricted to a certain period of time; Turkmenistan's, Tajikistan's and Uzbekistan's FIL allows for the application of the stabilization clause within 10 years of the date of investment.

In Central Asian states, it is common practice that state-investor contracts contain a stabilization clause. From the investor's point of view, such provisions can be considered effective mechanisms for protecting investor rights – particularly in countries that lack transparency and predictability. The recent discussion among a group of academics underlined that investment treaties interfere with the regulatory autonomy of the host country⁵⁰ while state-investor contracts, – including commitments with respect to regulatory stability, are more narrowly

Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts, 17(1) Yearbook of International Environmental Law 111, 119–128 (2007).

⁴⁸ UNCTAD, Investment Policy Review: Kyrgyzstan, United Nations (2016), at 7 (Nov. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d3_en.pdf.

⁴⁹ *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I)*, Moscow Chamber of Commerce and Industry Case No. A-2013/29, Award, at 58.

⁵⁰ Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge: Cambridge University Press, 2015); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36(1) University of Pennsylvania Journal of International Law 1 (2014).



designed and more clearly defined.⁵¹ In contrast, a stabilization clause in the context of a contract may continue to be a necessary tool for attracting foreign investment, and to compensate for challenges in the investment climate in the short term, while an increase in the number of contracts and provisions guaranteeing different conditions may create an extra burden for administration and create compliance difficulties. Additionally, such provisions due to the use of a contract with different conditions may include an element of arbitrariness and discriminatory treatment.⁵² It may be more even more complicated on the condition that the host country would change generally applicable regulations or take measures in order to concentrate on a specific investment.

2. Bilateral Investment Treaties in Central Asian States

Bilateral investment treaties (BITs) are described as a backbone of international legal instruments regulating foreign investment.⁵³ A majority of BITs include provisions relating to admission and establishment of foreign investment, treatment of foreign investment, protection against expropriation, and dispute resolution procedures.⁵⁴ This section of the paper reviews the main characteristics of Central Asian states' BITs. There are some countries among the Central Asian states that have bad reputations as host countries for foreign investment. Being party to BITs helps to counteract the negative effects of these reputations by sending a message to foreign investors that their investments are protected. This is likely the reason why Central Asian states often include transparency provisions in their BITs (or comprehensive incentives in their FDI regimes).

Besides Central Asian states' BITs, there are some regional agreements related to foreign investments such as the Eurasian Investment Agreement (EIA)⁵⁵ and the CIS (Commonwealth of Independent States) Investor Rights Convention.⁵⁶ Generally,

⁵¹ Robert Howse, *Freezing Government Policy: Stabilization Clauses in Investment Contracts*, 3(1) Investment Treaty News – A Quarterly Journal on Investment Law and Policy from Sustainable Development Perspective 3, 3 (2011).

⁵² Investment Policy Review: Tajikistan, *supra* note 20, at 8.

⁵³ Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, 45(4) New York University Journal of International Law and Politics 1151, 1154 (2013).

⁵⁴ See, for more detail, Muthucumaraswamy Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20(1) Journal of World Trade 79 (1986); Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15(5-6) Journal of World Investment & Trade 929 (2014).

⁵⁵ Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, and Tajikistan are part of this agreement. The purpose of agreement is to promote and protect investment in the Eurasian Economic Community (Nov. 4, 2019), available at <https://investmentpolicyhub.unctad.org/IIA/country/175/treaty/3252>.

⁵⁶ Armenia, Belarus, Moldova, Tajikistan, Kazakhstan, and Kyrgyzstan are part of CIS Convention on Protection of Investor Rights (Nov. 4, 2019), available at <https://investmentpolicyhub.unctad.org/IIA/treaty/3408>.



these treaties do not provide more protection to foreign investors than BITs and usually heavily rely on the host country's legislation. For example, Article 2 of the EIA defines that admission of investment is determined by the host country's legislation. This provision allows the host country to discriminate or impose strict rules for foreign investment during the pre-entry phase. Another example is Article 9 of the EIA. This provision imposed as a condition the expiry of six months before accessing arbitration. It seems that this provision is stricter than some of the Central Asian states' BITs. Similarly, CIS investment agreements cannot be seen as instruments of investment protection due to their weightily restricting the scope of provision with national laws.⁵⁷

2.1. Kazakhstan

Kazakhstan has taken an active role in promoting foreign investment since the collapse of the USSR. The country is often recognized as the most favorable destination for foreign investment among the Central Asian countries. Kazakhstan is a part of more than 48 BITs including with Kyrgyzstan, Tajikistan, and Uzbekistan.⁵⁸ The vast majority of Kazakhstan's investment treaties are broad enough that investment arbitration defines the scope of protection. Kazakhstan's lack of predictability of investment treaties may raise the issue of maintaining a balance between investor protection and the host country's power.⁵⁹

Kazakhstan's investment treaties (BITs) define foreign investors as natural persons and entities, including public entities. Comparative analyses of BITs show that the involvement of public entities in a BIT is a common practice in comparison with other host countries. However, the majority of Kazakhstan's BITs do not contain public entities in the scope of foreign investors, whereas some of Kazakhstan's BITs expressly included public entities as foreign investors. For example, Kazakhstan's BITs describe as a "public institution, corporations, partnerships, foundations and associations"⁶⁰ "government owned or controlled."⁶¹ Public entities in some of Kazakhstan's recent BITs have continued to be included in the scope of foreign investors.⁶²

Another important point relating to the definition of investment in Kazakhstan's BITs is the requirement for territory. Nearly all of Kazakhstan's BITs impose a territory

⁵⁷ Mavluda Sattorova, *International Investment Law in Central Asia: The Making, Implementation and Change of Investment Rules from A Regionalist Perspective*, 16(5-6) Journal of World Investment & Trade 1089, 1108 (2015).

⁵⁸ Investment Policy Hub, UNCTAD (Nov. 4, 2019), available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/107?type=c#iialInnerMenu>.

⁵⁹ OECD Investment Policy Reviews: Kazakhstan, *supra* note 3, at 134.

⁶⁰ Art. 1.6 of the Kazakhstan–Italy BIT (1996).

⁶¹ Art. 1.3 of the Kazakhstan–Japan BIT (2014).

⁶² Art. 1.b of the Kazakhstan–Estonia BIT (2014).



requirement. That means that foreign investment must be established and continued in the territory of Kazakhstan in order to take advantage of BIT protections. Investment treaties impose contracting state parties to enforce their national laws and regulations due to substantive obligations of investment. Enforcement of national laws and regulations by the home country is provided through international law on a territorial basis.⁶³ In light of international investment arbitrations, if questions arise about territoriality requirements, tribunals frequently turn to identify the scope of an investment treaty's objectives and purposes. If an investment treaty contains territoriality requirements in the scope of investments, it is highly possible that the investment treaty parties designated the restriction of foreign investment with territory on the scope of the protected investment.⁶⁴ Tribunals broadly interpret the territoriality requirement. A typical BIT starts with preamble that describes the general intention of the agreement and the provisions within its scope of application. In the case of Kazakhstan's BITs, nearly all include a reference to investments "in the territory of the other party."

Expropriation is an indispensable part of all investment treaties. Kazakhstan's BITs provide foreign investors protection against expropriation. The scope of such provisions includes direct and indirect expropriations. Some of Kazakhstan's BITs describe no explicit definition relating to indirect expropriations. As a rule, the relevant terms relating to indirect expropriation, in the context of BITs, will be evaluated by arbitral and tribunal reference to their meaning under international law.⁶⁵ Expropriation is not illegal on the condition of the existence of international standards (public purpose, non-discrimination and compensation).⁶⁶ From this point of view, Kazakhstan's BITs are in line with international law standards. Protection from expropriation is frequently excluded from public purpose⁶⁷ and national interest⁶⁸ in Kazakhstan's BITs. The scope of national interest may be problematic due to its broad definition. There is no guideline to define the general principle of national interest in Kazakhstan's legislation.

Additionally, while all of Kazakhstan's BITs contain dispute resolution provisions, access to arbitration is subject to the expiry of a certain period of time in most cases. As an example, Article 8 of the BIT between Kazakhstan and Sweden provides that investors cannot initiate international arbitration until six months have passed. This

⁶³ Douglas 2009, at 373.

⁶⁴ Christopher R. Zheng, *The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*, 34 Singapore Law Review 139, 143 (2016). See, for more detail, Douglas 2009, at 54.

⁶⁵ Expropriation, *supra* note 38, at 29.

⁶⁶ UNCTAD, Taking of Property, UNCTAD Series on Issues in International Investment Agreements, United Nations (2000), at 13 (Nov. 4, 2019), available at <https://unctad.org/en/docs/psiteitd15.en.pdf>.

⁶⁷ Art. 5 of the Kazakhstan–India BIT (1996); Art. 7.1/a of the Kazakhstan–Austria BIT (2010).

⁶⁸ Art. 4.2 of the Kazakhstan–BLEU (Belgium–Luxemburg, Economic Union) BIT (1998).



provision does not impose foreign investors to go to domestic courts.⁶⁹ There is no provision relating to the exhaustion of domestic courts in Kazakhstan BITs. The exhaustion of domestic courts is a more common provision among older BITs. The requirement to exhaust local remedies is time consuming and poses additional expenses for foreign investors.⁷⁰ It is interesting to point out that the majority of Kazakhstan's BITs with capital-exporting countries contain a requirement for the elapse of a certain period of time (such as three or six months) before initiating international arbitration. In contrast to this, there are some Kazakhstan BITs⁷¹ with developing countries (such as Uzbekistan) which impose no requirement relating to the expiry of certain period to access arbitration.

2.2. Kyrgyzstan

Kyrgyzstan is part of more than 35 bilateral investment treaties, as well as the Energy Charter Treaty. However, there are still some problems with implementation of such investment policy. It is widely recognized that one of the main elements necessary to attract foreign investment into a host country is political stability. The recent developments in Kyrgyzstan indicate that there are problems with enforcement of the law and significant political instability.⁷² Kyrgyzstan's BITs include general principles of foreign investment in the country, like typical BITs. There are some similar provisions in Kyrgyzstan's BITs compared to Kazakhstan's BITs. One shared provision is the expiry of a certain amount of time before initiating international arbitration (typically, six months). The vast majority of Kyrgyzstan's BITs also contain territoriality requirements.

Kyrgyzstan's investment treaties provide national and most-favored nation treatment. Some Kyrgyzstan BITs specify or limit the scope of national and most-favored nation clauses. For example, according to Article 3.1 of the BIT between Kyrgyzstan and Finland,

a treatment no less favorable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion,

⁶⁹ Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4(1) Law & Practice of International Courts and Tribunals 1, 4 (2005). See also Mavluda Sattorova, *Return to the Local Remedies Rule in European BITs?: Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law*, 39(2) Legal Issues of Economic Integration 223 (2012); Douglas Wong, *From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration*, 35 Singapore Law Review 114, 114–115 (2017); Sonia E. Rolland, *The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries*, 49(2) Loyola University Chicago Law Journal 387, 387–404 (2017).

⁷⁰ Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* 71, 73 (Leiden: Martinus Nijhoff Publishers, 2010).

⁷¹ Art. 10 of the Kazakhstan–Uzbekistan BIT (1997).

⁷² Investment Policy Review: Kyrgyzstan, *supra* note 48, at 9.



operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

Some of Kyrgyzstan's BITs exclude admission of investment within the scope of the national and most-favored nation clauses. For example, Article 2.1 of the Kyrgyzstan–Austria BIT states,

Each Contracting Party shall, according to its laws and regulations, promote and admit investments by investors of the other Contracting Party.

The function of such provisions may be viewed in two ways:⁷³ First, this provision gives rights to Kyrgyzstan to apply its admission rules and screening procedures, and the scope of such rules and procedures are defined by domestic laws. Second, this provision may allow for Kyrgyzstan to discriminate between domestic and foreign investors during the admission of foreign investment. Once foreign investment is admitted by Kyrgyzstan, it is possible to apply non-discrimination rules (national treatment) to foreign investors.

Kyrgyzstan guarantees protection against expropriation in the scope of its BIT. Such provisions provide no explicit definition relating to indirect expropriation. Instead of using this term, it is referred to as "equivalent to nationalization and expropriation." *Valeri Belokon v. Kyrgyz Republic*⁷⁴ is good example by which to evaluate Kyrgyzstan's indirect expropriation practice in the light of a BIT. The claimant alleged that Kyrgyzstan authorities restricted the operation of foreign investment (Manas Bank assets) without a legitimate legal reason, which would be a violation of the expropriation provision in Article 5 of Kyrgyzstan–Latvia BIT. In response to the claimant's allegations, Kyrgyzstan argued that administration of Manas Bank is examined in the scope of regulatory exercise of the policy powers of the Kyrgyz Republic. The tribunal pointed out that violation of the maximum time limit related to administrative control defined in Kyrgyzstan can be considered expropriation of investment. One of the conditions of expropriation in the scope of Article 5 of the Kyrgyzstan–Latvia BIT is public purpose. The tribunal noted that Kyrgyzstan's temporary administrative regime is not consistent with public purpose and that this administrative regime focused on scrutinizing suspicious wrongdoing of certain political authorities. In light of such evaluation, the measures taken by Kyrgyzstan related to expropriation (seizure of Manas Bank) including temporary administrative regime is to promote narrower interest of the government rather than public interest.⁷⁵ The tribunal continued to scrutinize

⁷³ Muchlinski et al. 2008, at 11.

⁷⁴ *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award (Nov. 4, 2019), available at <https://www.italaw.com/cases/3800>.

⁷⁵ *Id.* paras. 211 & 212.



Kyrgyzstan's measurements related to expropriation in the scope of discriminatory application. The tribunal pointed out that Kyrgyzstan's actions regarding Manas Bank, as well as certain other banks, included no element of discrimination.⁷⁶ Finally, the tribunal concluded that Kyrgyzstan has indirectly expropriated Manas Bank through an arbitrary and unjustified series of administrative regimes according to Article 5 of the Kyrgyzstan–Latvia BIT.⁷⁷ It is common understanding that public policy is broad enough to cover all measurement of the host country. In particular, this is a traditional approach when countries have problems with the rule of law and transparency.

2.3. Tajikistan

Tajikistan is party to more than 38 BITs, the Eurasian Investment Agreement, and the Energy Charter. It is difficult to say that Tajikistan takes an active role in promoting foreign investment through increasing its number of BITs.⁷⁸ Although most investment treaties provide substantial provisions regarding investment treatment and protection, Tajikistan is not actively engaged in sustainable development or in treaty making.⁷⁹

Tajikistan's BITs contain general principles of foreign investment such as admission of investment, treatment of investment, expropriation provisions, transfers, and dispute settlement procedures. The majority of Tajikistan's BITs impose territoriality requirements in the scope of investments, in a similar manner to Kazakhstan's and Kyrgyzstan's BITs. Public entities are also included in the scope of foreign investors. Special provisions related to the admission of foreign investment are common in Tajikistan's BITs. For example, Article 2/1 of the Tajikistan–Austria BIT states that,

Each Contracting Party shall, according to its law and regulations, promote and admit investments by investors of the other Contracting Party,

while Article 3/1 of the Tajikistan–Switzerland BIT states that,

...Subject to its right to exercise powers conferred by its laws each Contracting Party shall admit such investments.

This formulation of admission provision refers to national law and regulations. Restriction on foreign investment in the process of the entry phase is often called a controlled entry model. In this case, the admission of foreign investment is defined

⁷⁶ *Valeri Belokon v. Kyrgyz Republic*, *supra* note 74, para. 213.

⁷⁷ *Id.* para. 335.

⁷⁸ Tajikistan is not member state of ICSID (Nov. 4, 2019), available at <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

⁷⁹ Investment Policy Review: Tajikistan, *supra* note 20, at 6.



by the host country's laws and regulations. Additionally, it is interesting to point out that Tajikistan's BITs, like those of most countries (such as Germany, Austria, Switzerland, and India), impose admission procedures. The attitude of the host countries, including Tajikistan, can be different due to their willingness to protect their domestic and immature economic sectors. Consequently, this could be a main reason for taking control over entry and establishment in different economic sectors.⁸⁰

Tajikistan's BITs include protection against expropriation. The general principles of such provisions are in line with international law standards. Tajikistan's BITs define direct and indirect expropriation, and often explicitly define indirect expropriation. Calculation of expropriation compensation in Tajikistan's BITs does not follow the same formulation. There is frequent reference to the payment of compensation, such as "effective and adequate compensation,"⁸¹ "prompt, adequate and effective compensation,"⁸² and "fair and equitable compensation."⁸³

Tajikistan's BITs conditionally allow foreign investors to access international arbitration. One common requirement related to bringing a case against the host country is the expiry of a certain period of time. Some of Tajikistan's BITs include additional requirements for foreign investors before going to international arbitration. For example, Article 1 of the Tajikistan–India BIT states that,

Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted

a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or

b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

Such provisions impose the expiry of a certain duration of time, as well as resolution. It is only possible to go to international arbitration after the expiry of that time, and in the case of failed resolution. Probably, this clause is reflected by the 2016 Indian BIT model. This Indian BIT model is classified as restrictive with regard to the nature of the investor-state arbitration system. The main features of this model are the exhaustion of domestic remedy, the immunity of court decisions, and India not being party to the ICSID Convention.

⁸⁰ Muchlinski et al. 2008, at 11.

⁸¹ Art. 6.1 of the Tajikistan–Switzerland BIT (2009).

⁸² Art. 7.1/d of the Tajikistan–Austria BIT (2010).

⁸³ Art. 5.1 of the Tajikistan–India BIT (1995).



As previously stated, the expiry of certain duration of time before accessing arbitration is not exhaustive of domestic remedies.⁸⁴ That means that foreign investors have preferences between domestic courts and international arbitration. Once the time limit has expired it is allowed for foreign investors to access international arbitration. However, investment contracts may include requirements for local remedy in order to access international arbitration. When investment disputes arise from a violation of treaty rather than violation of investment contract, it may be possible to access international arbitration without the requirement of a local remedy. This approach is based on treaty rights that cannot be excluded by contractual provision.⁸⁵

2.4. Turkmenistan

Unlike other Central Asian states, most of Turkmenistan's BITs do not include public entity in the scope of foreign investor. The admission of foreign investment is also stricter compared to Kazakhstan's and Kyrgyzstan's BITs. The formulation of admission provisions in Turkmenistan's BITs are to be standardized. From this perspective, the admission of foreign investment highly depends on Turkmenistan's legislation. This is main feature of Turkmenistan's BITs. For example,

Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws and regulations, shall admit such capital,⁸⁶

or

Each Contracting Party shall admit the investment by investment of the other Contracting Party in accordance with its legislation and administrative practice, and promote such investments as far as possible including establishments of representative offices.⁸⁷

Turkmenistan's BITs provide most-favored and national treatment clauses to foreign investors. Primarily, foreign investors can extend the scope of BIT's protection through most favored nation clause. It is the case that the country imposes more restrictive provisions than others. In other words, the severability of provisions in BITs can raise questions in some cases. *Kılıç İnşaat İthalat İhracat Sanayi v. Turkmenistan*⁸⁸

⁸⁴ Schreuer 2005, at 6.

⁸⁵ Sornarajah 2010, at 221.

⁸⁶ Art. 2.2/1 of the Turkmenistan–Bahrain BIT (2011).

⁸⁷ Art. 2.2 of the Turkmenistan–Egypt BIT (1995).

⁸⁸ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1.



provides a good example to clarify the scope of most-favored national clause in the context of Turkmenistan's BITs. The tribunal found that the most-favored nation clause was granted and intended to refer only to the scope of substantive rights in the Turkmenistan–Turkey BIT. From the tribunal's point of view, remedial procedures do not cover the scope of the most-favored national clause. But this is not a widely-recognized approach to determining the scope of the most-favored nation clause.

The settlement of dispute provision can be extended as it is compatible with the *ejusdem generis* if a third party treat provides more favorable treatment to the protection of investor's rights and interests than those in the basic treaty.⁸⁹

From this point of view, the scope of the most-favored national clause relies on a broad interpretation.

Foreign investors may have access to international arbitration in the scope of Turkmenistan's BITs. In the same manner as Kazakhstan's, Kyrgyzstan's and Tajikistan's BITs, the application of this provision is conditional. However, the duration of time as a condition of accessing international arbitration ranges from three months to six months. In light of recent practice in international investment arbitration, it seems to be difficult for foreign investors to go to international arbitration through the most-favored nation clause. The dispute settlement clause is considered within the scope of procedural rights, and the most-favored nation clause is only applicable for substantial rights.

All of Turkmenistan's BITs provide protection for foreign investors against direct and indirect expropriation. Although the conditions (public purpose, due procedure of law, non-discrimination) for expropriation are nearly similar in most of Turkmenistan's BIT, the formulation of expropriation clauses is not standardized. Some of Turkmenistan's BITs contains detailed and broad expropriation clause. Take as an example Article 6 of the Turkmenistan–UAE BIT, which notes that investors have the right to refer to administrative or juridical bodies to make sure that expropriation has been made with accordance to the principles of international law. Such provisions are not in existence in Turkmenistan's BITs with other countries. Most of Turkmenistan's BITs indicate how compensation shall be calculated, but formulation of compensation is different. Several of Turkmenistan's BITs⁹⁰ provide for "prompt, adequate and effective compensation," whereas some contain "effective and adequate compensation"⁹¹ or "fair and equitable compensation."⁹²

⁸⁹ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, para. 56.

⁹⁰ Art. 6.h of the Turkmenistan–UEA BIT (1998); Art. 5 of the Turkmenistan–Egypt BIT (1996); Art. 5 of the Turkmenistan–Israel BIT (1997); Art. 6 of the Turkmenistan–Russia BIT (2010).

⁹¹ Art. 6.1 of the Turkmenistan–Swiss Federal Council BIT (2009).

⁹² Art. 5.1 of the Turkmenistan–India BIT (2006).



2.5. Uzbekistan

Uzbekistan is party to more than 53 BITs and the Energy Charter Treaty. Uzbekistan has entered new era in liberalization of its national economy, including, beginning in 2017, comprehensive reform of its FDI regime.⁹³ Unlike other Central Asian states, it is not common provision to cover the public entity or sovereign within the scope of Uzbekistan's BITs. For example, the Uzbekistan–China BIT defines enterprise as,

any entities, including companies, firms, associations, partnerships and other organizations incorporated or constituted under the applicable laws and regulations of either Contracting Party and have their seats and substantial business activities in that Contracting Party, irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not.

Furthermore, there are some Uzbekistan BITs that impose additional requirements for entities, such as “effective and continuous link to Uzbek economy.”⁹⁴ It is highly possible that there are some foreign entities which are not considered foreign investors within the scope of this provision – in particular, offshore companies. However, such provisions do not provide any definition of an “effective and continuous link” related to a given entity. According to the OECD definition of an offshore company, it is a company that is formally registered, incorporated or otherwise legally-organized in an economy, but such company has no conduct or operation in that economy other than in a pass-through capacity.⁹⁵ From that point of view, such a provision means that it is possible that a lack of “effective and continuous link” exists and is thus considered non-eligible within the scope of the Uzbekistan–Portugal BIT.

Uzbekistan's BITs frequently contain admission provisions similar to Turkmenistan's and Tajikistan's. In other words, Uzbekistan retains a total right to regulate admission of foreign investment through a controlled entry model. One example is Article 2.1 of the BIT between Uzbekistan and Hungary, which states that,

Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to make investments in its territory and, shall admit such investments in accordance with its laws and regulations,⁹⁶

⁹³ The World Bank in Uzbekistan, Overview (Nov. 4, 2019), available at <https://www.worldbank.org/en/country/uzbekistan/overview>.

⁹⁴ Art. 1.3/b of the Uzbekistan–Portugal BIT (2001).

⁹⁵ OECD, Glossary of Foreign Direct Investment Terms and Definitions (Nov. 4, 2019), available at <https://www.oecd.org/daf/inv/investment-policy/2487495.pdf>.

⁹⁶ Uzbekistan–Hungary BIT (2003).



or

Each Contracting Party shall, in accordance with its State law, admit and encourage in its State territory investments by investors from the State of the other Contracting Party and shall guarantee to these investments full and unconditional legal rights.⁹⁷

Once investment is approved in accordance with Uzbekistan law and regulation, foreign investors can enjoy full and unconditional rights. Application of the controlled entry model as a requirement for admission continues to exist in recent Uzbekistan BITs.⁹⁸

Uzbekistan's BITs provide national and most-favored nation clauses for foreign investors. In the case of the national treatment clause – in contrast to Kazakhstan's, Kyrgyzstan's and Tajikistan's FDI regimes – domestic and foreign investors are regulated by separate laws and regulations. Generally, foreign investors are more favorably-treated than domestic investors. Furthermore, there are some economic sectors that are not open to entry by foreign investors in the scope of the Uzbekistan FDI regime, such as the public mail service (which is under natural monopoly). Foreign investors may bring investment disputes to international arbitration after a certain duration of time. The elapse of six months prior to accessing international arbitration exists in nearly all of Uzbekistan's BITs.

Some of Uzbekistan's BITs including the fork in the road provisions are to provide foreign investor with a choice of bringing claim before local courts or national arbitration or before international investment arbitration. Article 10 of the Uzbekistan–Kazakhstan BIT may be taken as an example:

Each Contracting Party hereby agrees that any legal dispute arising between one of the Contracting Parties and an investor from the State of the other Contracting Party in relation to investments made by him or her in the State territory of the first Contracting Party shall be submitted for consideration to one of the following organizations...

Such dispute settlement provisions include no additional requirement for foreign investors to access international arbitration.

Conclusion

Central Asian states have made some achievements with regard to attracting foreign investment since the fall of the Soviet Union. However, the effectiveness of

⁹⁷ Uzbekistan–Kazakhstan BIT (1997).

⁹⁸ Uzbekistan–China BIT (2011); Uzbekistan–Turkey BIT (2018).



economic reforms and the liberalization process, including FDI regimes, is dubious in the region. In particular, the rule of law, and the transparency and predictability of the legal framework governing foreign investment, continue to be major problems. Beyond these bounds, some of Central Asia's states do not have clear national investment policies. It is common tendency in Central Asian states' BITs to restrict the scope of such treaties with domestic laws. That is especially true in the case of Turkmenistan, Tajikistan, and Uzbekistan. This phenomenon may reduce the impact of investment treaties and negatively impact the flow of foreign investment into Central Asia. Furthermore, Central Asian states' BITs provide more favorable conditions for foreign investment compared to the Eurasian Investment Agreement and the CIS Investor Right Convention.

It should be kept in mind that foreign investors desire to have their investments protected in the context of international standards because national investment legislation usually provides for less protection for foreign investors than international standards. Additionally, problems with the transparency and predictability of the host country's legislation may create risks for foreign investment. These are the main reasons for the avoidance of host country legislation and for pressuring the host country to adhere to international standards.

The main determiners of the relative attractiveness of foreign investment include the rule of law, and the transparency and predictability of the host country's legal framework governing foreign investments. Foreign investors planning their investments consider the overall investment climate, which is based on not only economic conditions but also the legal framework for foreign investment. Transparency and predictability allow foreign investors to plan their investments with great certainty and reduce as much as possible non-commercial risks.

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